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NO. 83- \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

JOHN ELDON SMITH,

Petitioner,

v.

RALPH M. KEMP, SUPERINTENDENT,  
GEORGIA DIAGNOSTIC AND  
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

### I.

Whether the United States Court of Appeals for the Eleventh Circuit properly applied federal legal principles to the facts as fully developed in the state courts in determining that Petitioner had failed to establish a violation of Petitioner's due process rights under this Court's decision in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 762 (1972), and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959)?

### II.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner had failed to establish cause and prejudice under this Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977), so as to allow a consideration of Petitioner's claim of improper jury selection on its merits, where the right to litigate this claim had been waived as a matter of state law?

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PART ONE

STATEMENT OF THE CASE

Petitioner, John Eldon Smith, a/k/a Anthony Isalido Machetti, was convicted of two counts of murder in the Superior Court of Bibb County on January 27-30, 1975. Having found the Petitioner guilty of these murders, the jury found the presence of the statutory aggravating circumstance contained in O.C.G.A. § 17-10-30(b)(4); Ga. Code Ann. § 27-2534.1(b)(4), i.e., that these murders had been committed for the purpose of receiving money or other things of monetary value. Having made this finding, a sentence of death was imposed on two counts of murder.

Briefly stated, Petitioner's wife, Rebecca Akins Smith Machetti, the Petitioner and a friend, John Maree, plotted the murder of Petitioner's wife's former husband, with the intent of redeeming the proceeds of the former husband's insurance policies whose beneficiaries were Mrs. Machetti and her three daughters. (Trial transcript, p. 402-403; 411-413; 815; 835). Petitioner was to share in the proceeds from the insurance policy with his wife and Mr. Maree was to profit by \$1,000.00. (Trial transcript, p. 322-23; 325-26). There was also evidence that Petitioner was motivated by the possibility of enhancing his reputation as a "hit man" in the underworld, due to the murders. (Trial transcript, p. 326-27). The murder of Joseph Ronald Akins and his new wife of 27 days, Juanita Knight Akins, occurred on August 31, 1974, as the result of shotgun wounds administered at close range. (Trial Transcript, p. 200, 220-222, 334-39, 341-42, 502).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions and death sentences were upheld. Smith v. State, 236 Ga. 12, 222 S.E.2d 308 (1976), cert denied, 428 U.S. 910 (1976).

Next, Petitioner initiated state habeas corpus proceedings in the Superior Court of Tattnall County, Georgia. An evidentiary hearing was conducted on November 30, 1976. At this hearing, Petitioner was represented by three attorneys and three witnesses, including Dr. Faye Goldberg and Mr. Hans Zeisel, testified in support of the allegations of the petition. Petitioner did not testify in his own behalf at the hearing.

On March 14, 1977, the state habeas corpus court denied relief to the Petitioner on all grounds raised in his petition. The Supreme Court of Georgia granted Petitioner's application for a certificate of probable cause to appeal from the denial of habeas corpus relief. The Supreme Court of Georgia affirmed the judgment of the state habeas corpus court



in Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), cert. denied, 436 U.S. 950 (1978).

Petitioner, represented by counsel, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division, on February 21, 1979. An order was signed by the district court allowing Petitioner to proceed in forma pauperis on February 21, 1979 and a stay of execution was filed on the same date. An answer was filed on behalf of the Respondent in response to that petition on April 4, 1979.

By order of the district court dated April 21, 1980, Petitioner's federal habeas corpus petition was referred to the United States Magistrate for the submission of proposed findings of fact and recommendations for disposition to the district judge. On September 9, 1980, the magistrate filed proposed Findings of Fact and Conclusions of Law and recommended that the petition for a writ of habeas corpus be denied. Petitioner filed objections to the magistrate's proposed Findings of Fact and recommendations for disposition on October 20, 1980. On November 26, 1980, the district court, stating that it had carefully reviewed the magistrate's report and recommendation, adopted the report and recommendation as the opinion and order of the district court and denied Petitioner's habeas corpus petition. A motion for rehearing filed on behalf of the Petitioner was denied by the district court on December 5, 1980.

Petitioner, represented by counsel, appealed from the denial of federal habeas corpus relief to the United States Court of Appeals for the Fifth Circuit. Briefs were filed and oral argument was held in that court and the judgment of the district court denying federal habeas corpus relief was affirmed in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981). Petitioner filed a petition for rehearing which was denied in a separate opinion issued by the United States Court of Appeals

for the Fifth Circuit in Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982).

A stay of execution was granted by the United States Supreme Court on May 18, 1982, pending the filing of a petition for a writ of certiorari. The petition was filed on June 28, 1982, seeking review by the Supreme Court of the United States of the decision of the United States Court of Appeals for the Fifth Circuit. In his petition for a writ of certiorari, Petitioner raised certain issues which were also later raised in his successive habeas corpus petition filed in the Superior Court of Butts County. The petition for a writ of certiorari was denied on October 4, 1982.

On June 25, 1982, a successive petition for a writ of habeas corpus was presented on behalf of Petitioner in the Superior Court of Butts County, Georgia. The petition was dismissed without an opportunity for counsel for the Respondent to respond in any way to the allegations of the petition. Respondent presented the Superior Court of Butts County with a nunc pro tunc order withdrawing the court's initial order and declining to sanction the petition. Counsel for both parties filed applications for certificates of probable cause to appeal to the Supreme Court of Georgia. The Supreme Court of Georgia remanded this case to the lower court for an "evidentiary hearing" on the issues raised in Petitioner's second state habeas corpus petition.

The evidentiary hearing mandated by the Supreme Court of Georgia was scheduled for November 8, 1982. Following a prehearing conference, the Superior Court of Butts County determined that the scope of the hearing, as an initial matter, was to be limited to whether or not Petitioner had waived the right to present the grounds raised in his second habeas corpus petition, and whether Petitioner could reasonably have raised the grounds presented in his second habeas corpus petition, in his original habeas corpus petition. The Superior Court of Butts County specifically reserved the question of whether



there would be a further evidentiary hearing on the merits of the allegations of the second habeas corpus petition.

Following a hearing on the issue of waiver, the Superior Court of Butts County entered an order, dated November 15, 1982, finding with respect to each of the issues raised in Petitioner's second habeas corpus petition, that Petitioner had failed to show that these issues were constitutionally non-waivable and that Petitioner had failed to show that these issues could not reasonably been raised in his original habeas corpus petition which was filed in the Superior Court of Tattnall County, Georgia.

Petitioner appealed these two orders of the Superior Court of Butts County to the Supreme Court of Georgia. In Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983), the Supreme Court of Georgia found that with respect to Petitioner's allegation of an unconstitutionally composed jury that, "Petitioner has not shown grounds for raising this issue in his second habeas petition and the habeas court did not err in refusing to hear the matter on its merits." Smith v. Zant, supra at 647.

With respect to Petitioner's claim that the death penalty statute in Georgia is being applied arbitrarily and discriminatorily, the Supreme Court of Georgia, noting that this issue had been raised in Petitioner's first state habeas as well as in his first federal habeas petition, found that:

Now, in his successive state habeas, Smith seeks to bolster his claim of discriminatory application with preliminary analysis of a more recent study. Since, however, the ground has previously been raised and rejected, it is not cognizable in a successive petition under the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127), and was properly dismissed. If the rule were otherwise, a "new study" could be

produced quarterly by another investigator using more detailed data to form the basis of yet another habeas petition.

Id. at 648.

However, the Supreme Court of Georgia remanded the case to the Superior Court of Butts County by stating the following:

We, therefore, hold that Smith has alleged facts, supported by affidavits, sufficient to satisfy the requirements of O.C.G.A. § 9-14-51 (Code Ann. § 50-127) to entitle him to a hearing on the merits of his false testimony claim, i.e., Petitioner has shown grounds for relief which could not reasonably have been raised in his original habeas petition. The habeas court erred in dismissing Smith's Napue-Giglio claim and we remand this case for a hearing on the merits of this issue. (Cites omitted).

Id. at 652.

Pursuant to the decision of the Supreme Court of Georgia in Smith v. Zant, supra, two evidentiary hearings were held in May and June of 1983 on the merits of the Giglio claim. On August 5, 1983, the Superior Court of Butts County entered an order finding that Petitioner's allegation was without merit, i.e., that Petitioner had failed to establish a "Napue-Giglio" claim and dissolved Petitioner's stay of execution.

A notice of appeal and application for certificate of probable cause to appeal were filed in the Supreme Court of Georgia on August 12, 1983. On August 16, 1983, the Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal.

On August 17, 1983, Petitioner filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and an

application for a stay of execution in the United States District Court for the Middle District of Georgia, Macon Division. On that same date, a hearing was conducted before the district court and counsel for the Petitioner and Respondent were allowed to present argument and/or evidence to the court for its review. After a two hour hearing before the district court, the district judge instructed counsel for both parties to present any further pleadings and/or documents to the court for its review by 5:00 p.m. on August 18, 1983. A complete record of all the prior proceedings described above was submitted to the district court for its consideration by counsel for both parties.

On August 19, 1983, the district court entered an order in which it found that consideration of two of Petitioner's issues was foreclosed and that the third issue raised by the Petitioner in his application for federal habeas corpus relief was without any "possible merit." In the district court's order of August 19, 1983, the district court not only denied Petitioner federal habeas corpus relief, but also denied Petitioner a certificate of probable cause to appeal in forma pauperis and denied Petitioner's motion to stay his execution. As the district court's order further noted, upon being advised of the entry of this order, counsel for the Petitioner moved the district court for a stay pending appeal to the Eleventh Circuit Court of Appeals, but the motion was denied.

Also on August 19, 1983, Petitioner filed a notice of appeal from the judgment of the district court. The filing, by Petitioner on August 22, 1983, of an application for a certificate of probable cause to appeal and an application for a stay of execution, followed the filing of Petitioner's notice of appeal. Petitioner also filed an application for leave to proceed in forma pauperis in the United States Court of Appeals for the Eleventh Circuit. Respondent filed a response to the application for a stay of execution and the application for a certificate of probable cause to appeal.

At 5:00 p.m. on August 22, 1983, Counsel for Respondent was informed that the United States Court of Appeals for the Eleventh Circuit desired oral argument to be conducted on August 23, 1983 at 11:00 a.m. in the United States Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Oral argument was heard by the United States Court of Appeals for the Eleventh Circuit from 11:00 a.m. to 1:30 p.m. on August 23, 1983. At 4:25 p.m. on August 23, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order granting Petitioner's motion for a stay of execution, granting Petitioner's application for certificate of probable cause to appeal, granting Petitioner's motion for leave to proceed in forma pauperis, and granting the motion of the Petitioner to file out-of-size Appendices. An application to vacate the stay of execution granted to Petitioner was denied by Mr. Justice Powell on September 14, 1983. Additional briefs were filed for Respondent and Petitioner on August 29, 1983, and August 30, 1983, respectively.

On September 9, 1983, the United States Court of Appeals for the Eleventh Circuit entered an order dissolving the previously entered stay of execution and affirming the judgment of the district court denying federal habeas corpus relief.

On September 13, 1983, Petitioner John Eldon Smith filed a motion for a stay of execution until such time as the Eleventh Circuit ruled on the suggestion for rehearing en banc, said suggestion for rehearing en banc having also been filed on September 13, 1983. Respondent filed a response opposing the granting of a motion for stay of execution on September 14, 1983.

On September 15, 1983, a panel of the United States Court of Appeals reinstated the stay of execution until such time as the mandate issues. Respondent filed an application to vacate the stay of execution in this Court. The application was denied by Mr. Justice Powell on September 17, 1983 and by the full court on October 3, 1983.

Petitioner's petition for rehearing en banc was denied by the United States Court of Appeals for the Eleventh Circuit on September 29, 1983. Petitioner's motion for stay of the mandate was granted on October 7, 1983 by the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR NOT GRANTING THE WRIT

- I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH A VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER GIGLIO V. UNITED STATES, 405 U.S. 150 (1972); AND NAPUE V. ILLINOIS, 360 U.S. 264 (1959).

Petitioner alleges that his constitutional rights to due process under Giglio v. United States, 405 U.S. 150 (1972) and Napue v. Illinois, 360 U.S. 264 (1959) were violated. Specifically, Petitioner alleges state's witness John Maree testified against Petitioner at his trial, "under the inducement both of a promise of life imprisonment and of a specific threat of initial prosecution and a likely death sentence unless he testified against Petitioner." (Brief of Petitioner, page 18). The United States Court of Appeals for the Eleventh Circuit found no violation of Giglio v. United States, supra, under either of these theories asserted by Petitioner. As the United States Court of Appeals for the Eleventh Circuit noted in Smith v. Kemp, No. 83-8611 (September 9, 1983, 11th Cir. ), the essence of a Giglio violation is as follows:



The thrust of Giglio and its progeny has been to ensure that the jury know the facts that might motivate a witness in giving testimony, and that the prosecutor not fraudulently conceal such facts from the jury. We must focus on the "impact on the jury." United States v. Anderson, 574 F.2d 1347, 1356 (5th Cir. 1978); see United States v. Meinster, 619 F.2d 1041, 1044-45 (4th Cir. 1980). (Intent of Giglio "is not to punish the prosecutor; rather the primary concern is that the jury not be misled by the prosecution's knowing use of perjured testimony."); United States v. Barham, 595 F.2d 231, 243 (5th Cir. 1979).

Smith v. Kemp, supra. Slip Op. at 5166.

In his petition for a writ of certiorari, Petitioner admits that the testimony of Maree "may not have been technically perjurious" (Petitioner's Brief, page 19), but alleges that this is not determinative of the issue before the Court. The essence of Petitioner's contention is that alleged "misimpressions" given to the jury constituted a Giglio violation. Respondent respectfully submits that it is clear that the United States Court of Appeals for the Eleventh Circuit found that under the facts as they were developed in the state courts, no Giglio violation occurred under either of the theories alleged by the Petitioner, i.e., alleged undisclosed promises or threats. Id. at 5166.

The United States Court of Appeals for the Eleventh Circuit properly applied the presumption of correctness to the state court's findings of fact, after having found that the state habeas corpus court afforded Petitioner a full and fair hearing. Smith v. Kemp, Slip Op. at 5163.



An opportunity for evidentiary development was provided to Petitioner with respect to the Giglio issue in the Superior Court of Butts County in May and June of 1983. The transcript of both of these hearings were provided to the United States Court of Appeals for the Eleventh Circuit. At these two hearings, numerous witnesses presented extensive testimony concerning Petitioner's Giglio claim. As the United States Court of Appeals for the Eleventh Circuit noted, "Indeed, every person in life who was suggested as having knowledge of the alleged deal appeared, in person, and gave testimony on direct and cross-examination." Smith v. Kemp, Slip Op. at 1562.

Included among these witnesses were the state's key eyewitness against Petitioner, co-perpetrator, John Maree; the prosecutor at Petitioner's trial, Fred Hasty; Willis Sparks, the attorney representing John Maree at the time of Petitioner's trial in the Superior Court of Bibb County; and Sheriff Ray Wilkes, who was involved in the investigation of the murders with which Petitioner and John Maree had been charged. Various pieces of documentary evidence were presented by counsel for both parties, including excerpts from Petitioner's original trial transcript in the Superior Court of Bibb County, Georgia, and the indictment and sentence of John Maree in the Superior Court of Bibb County, Georgia.

Each of the principle witnesses with respect to the Giglio issue was subjected to cross-examination by counsel for the Petitioner. Each hearing was lengthy and there was sufficient time between the two hearings for counsel for the Petitioner to make any further requests with reference to compelling the attendance of other witnesses and or producing other documentary evidence. Even after the conclusion of the second evidentiary hearing, the state habeas corpus court allowed counsel for the Petitioner an additional few days to determine whether or not he wished to take the deposition of Millard Farmer and submit it to the court for its consideration. (June 13, 1983 hearing, page 144-143).

The United States Court of Appeals for the Eleventh Circuit addressed each contention raised by Petitioner as to why the state habeas corpus hearings were not "full and fair" but properly rejected these contentions, having analyzed them fully, holding the following:

We concluded the state habeas court afforded Petitioner a full and fair hearing on this contention. All witnesses desired by Petitioner were produced even where adjournment was required for their production. No admissible evidence offered by the Petitioner was excluded. The finding that there was not a pretrial agreement or promise to Maree was supported by all the sworn testimony and it was substantial. Absent a deal or promise, there was no Giglio violation arising from the failure of the prosecution to reveal one.

Smith v. Kemp, supra, Slip Op. at 5165.

In finding that there was no pretrial agreement or promise to state's witness John Maree, the United States Court of Appeals for the Eleventh Circuit reviewed the testimony of each of the witnesses at the state habeas corpus hearings and noted that in its order of August 5, 1983, the state habeas corpus court reached the following conclusion:

Petitioner has failed to present evidence to this Court which would establish that the testimony of Mr. Maree given at Petitioner's trial was in fact false and known to be false by the prosecution so as to establish a constitutional violation in light of Giglio v. United States, 405 U.S. 150

(1972), or Napue v. Illinois, 360 U.S. 264 (1958). Therefore, this Court concludes that Petitioner was not deprived his right to a fair trial under due process principles.

(Order of State Habeas Court, dated August 5, 1983).

At the first habeas corpus hearing conducted on May 10, 1983 in the Superior Court of Bibb County, Georgia, concerning Petitioner's Giglio claim, Mr. Willis Sparks, who represented John Maree in 1974 on charges of murder lodged against him in the Superior Court of Bibb County, appeared and testified. Mr. Sparks stated that he was practicing law in 1974 and was appointed to represent Mr. Maree subsequent to the time that Maree gave a detailed confession to law enforcement authorities admitting his participation in the crimes with which Maree, Petitioner, and Petitioner's wife were charged. (May 10, 1983 hearing, page 37-49). As noted by the state habeas corpus court, at the time of Mr. Sparks appointment the cases of all three co-defendants were pending. (May 10, 1983 hearing, page 49). Mr. Sparks testified that he viewed his task as obtaining the most favorable disposition of Maree's case possible under the circumstances. (May 10, 1983 hearing, page 50).

As noted by the state habeas corpus court and the United States Court of Appeals for the Eleventh Circuit, Sparks asked District Attorney Hasty point blank, "What was in it for Maree if he testified against Petitioner?" (May 10, 1983 hearing, page 50). Mr. Sparks stated that Hasty's reply was that he would not make any agreement with the co-defendant before trial because that was not his practice. (May 10, 1983 hearing, page 50). Mr. Sparks also stated that throughout his discussions with the district attorney, Mr. Hasty was steadfast that he would not make a deal in advance with a co-defendant. (May 10, 1983 hearing page 51). Smith v. Kemp, Slip Op. at 5162.

With respect to whether or not Assistant District Attorney Thompson ever made any promises to Maree in return for Maree's testimony against the Petitioner, Mr. Sparks stated that Thompson never made any promise to Maree because Hasty was "calling the shots" and Thompson deferred to Hasty. (May 10, 1983 hearing, page 53). Mr. Sparks further stated that no one from the district attorney's office in Bibb County made any promises to him as Maree's attorney. (May 10, 1983 hearing, page 54). Mr. Sparks also stated that he did not recall that Maree talked with anyone with whom he could have made a deal, as it was not the practice in Bibb County to "deal" with the Sheriff or Sheriff's deputies with reference to agreements to testify. (May 10, 1983 hearing, page 66-67).

Mr. Sparks' testimony shed light on the reasons for Maree's testimony against the Petitioner, as Mr. Sparks stated that he told Maree that he thought it would be in his best self-interest to testify against Petitioner because Maree had already given a confession, his palm print had already been found in the victim's car and there was some chance the state might seek the death penalty, even though the evidence did not appear to show that Maree was the triggerman. (May 10, 1983 hearing, page 51). Instead, Mr. Sparks testified that Maree's motivation for testifying against the Petitioner was that Maree was "in love" with one of Mrs. Machetti's daughters and Maree thought that Mrs. Machetti would murder that daughter if she were ever released. Later, Mr. Sparks stated that his client had reason to regret that he did not have a "deal" worked out with the prosecution and complained bitterly about the lack of agreement with the state. (May 10, 1983 hearing, page 51-52). Smith v. Kemp, supra. Slip Op. at 5163, n.4).

Mr. Fred M. Hasty, District Attorney of Bibb County at the time Petitioner was tried, stated that he knew what he was going to do with reference to the case pending against John Maree, if Maree testified against Petitioner, but that he did not discuss this with Mr. Sparks, who was the attorney



representing Mr. Maree. (May 10, 1983 hearing, page 77). Mr. Hasty reaffirmed the truthfulness of what he informed the jury, i.e., that no promises had been made with Petitioner and stated that his closing argument given at Petitioner's trial constituted the truth. (May 10, 1983 hearing, page 87). Mr. Hasty did recognize that he had given a contradictory statement in a deposition and an affidavit, but stated that he thought that these statements were true at the time that he made them, but recognized their falsity after reviewing his file and the transcript of Petitioner's trial. (May 10, 1983 hearing, page 88-89, 93). Mr. Hasty stated at the time he gave the contradictory statement, he had not reviewed his file or the transcript. (May 10, 1983 hearing, page 100-101). Smith v. Kemp, supra, Slip Op. at 5162.

As noted by the United States Court of Appeals for the Eleventh Circuit, Sheriff Ray Wilkes of Bibb County stated that he was Chief Deputy of Bibb County at the time the Petitioner was tried and was involved in the investigation of the murder. (June 13, 1983 hearing, page 139-140). Sheriff Wilkes stated that no promises were made to Maree prior to his giving his incriminatory statement, nor did any member of the Sheriff's office make any promise to Maree. (June 13, 1983 hearing, page 14-141). Smith v. Kemp, Slip Op. at 5163.

At Petitioner's insistence, John Maree appeared in person and testified at one of the state habeas corpus evidentiary hearings held in the Superior Court of Butts County, Georgia. The United States Court of Appeals for the Eleventh Circuit correctly characterized Petitioner's testimony as being "unequivocal." Id. Maree stated, "At the first trial, there was no question about testifying. I didn't have any real conversations regarding any kind of a deal whatsoever." (June 13, 1983 hearing, page 10). Mr. Maree stated that he had no discussions with Hasty concerning a life sentence in exchange for his testifying against Petitioner. (June 13, 1983 hearing, page 10). Maree stated that he had no expectations

prior to testifying against Petitioner at Petitioner's trial. (June 13, 1983 hearing, page 11). As noted by the United States Court of Appeals for the Eleventh Circuit, Maree stated that he testified against Petitioner on the advice of his attorney who told him it would be in his best interest to give full testimony. Id.

Having reviewed all of this extensive testimony, the United States Court of Appeals for the Eleventh Circuit properly found there to have been no Giglio violation based on the state habeas corpus court's conclusion that no promise had been made to or agreement had been made with the state witness John Maree. The United States Court of Appeals for the Eleventh Circuit properly noted:

In so finding, the judge found in accordance with all the sworn testimony taken from all the witnesses who appeared before him. To have found to the contrary would have required a finding that each and every witness who knew the facts had lied in their testimony given at the hearing. Id.

Based on all of the evidence before the court, the United States Court of Appeals for the Eleventh Circuit properly found that there were no undisclosed promises or agreements established by Petitioner to support a finding that a Giglio violation had occurred. The United States Court of Appeals for the Eleventh Circuit went further and considered Petitioner's second contention that the alleged failure of the prosecution to reveal a "threat" against state witness John Maree violated Giglio v. United States, supra. The United States Court of Appeals for the Eleventh Circuit specifically looked at the closing argument given by the district attorney, which is quoted in pertinent part in Smith v. Kemp, supra, Slip Op. at 5165. The United States Court of Appeals for the Eleventh Circuit noted that based on the closing argument given by Hasty



at Petitioner's trial, "The threatened position of Maree was clear to the jury." Id. Specifically, the jury was informed about Maree's motivation as follows, "Of course, you have to understand in his testimony that he is hoping he is going to save himself from the electric chair. It is the human reaction. It is natural for him to hope that but he told you, and I can tell you, there has been no promise." Id.

The United States Court of Appeals for the Eleventh Circuit, contrary to the assertion of the Petitioner, properly found that the jury was not misled at all in this case, whether the alleged misimpressions revealed undisclosed threats or promises. The court found:

In this case Maree's fears and aspirations were clear. The jury was made aware of Maree's situation and could test his credibility taking his threatened posture into consideration. Under the facts of this case, no Giglio violation occurred.

Smith v. Kemp, supra, Slip Op. at 5166.

Contrary to the allegations of Petitioner, the evidence developed in the state habeas corpus court does not establish any "deliberately orchestrated misimpressions" given to the jury by the district attorney either in his examination of state's witness John Maree or in his closing argument to the jury. Respondent does not disagree that Petitioner's jury was entitled to full knowledge of any threats or inducement under which Maree testified, but rather takes issue with Petitioner's assertions that there was not the full disclosure to the jury of possible motivations of Maree upon which to test his credibility.

In his petition for certiorari, Petitioner has cited the decision of this Court in Alcorta v. Texas, 355 U.S. 28, 31 (1957), for the proposition that a false impression, even if not literally false, can support a Giglio violation. The facts

in Alcorta v. Texas, supra, are clearly distinguishable from those established in this case. In Alcorta v. Texas, supra, the state prosecutor had promised the key state's witness "consideration," but did not correct false evidence introduced at trial by this key eyewitness. This Court found a due process violation based on the state allowing "false evidence" to go uncorrected. No "false evidence" was allowed to go uncorrected, nor were there any "false impressions" which could even arguably even supported a Giglio violation.

Petitioner cites the case of United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976), for the proposition that the concealment of a promise of leniency and the concealment of a threat to prosecute are indistinguishable. Respondent does not concede that there was any threat to prosecute in this case or that any such alleged threat was in fact concealed. However, United States v. Sutton, is clearly distinguishable from the facts of this case, as under the facts presented to the Court in United States v. Sutton, supra, the jury was assured that there had been no threats made to a witness when an FBI agent had in fact made an overt threat to such a witness. No such threat was in fact made in this case and as the United States Court of Appeals for the Eleventh Circuit properly found, the jury was well aware of all motivations which Maree might have for testifying against the Petitioner, which could affect his credibility.

Based on the extensive evidence presented in the state habeas corpus court, which was properly afforded the presumption of correctness by the district court and the United States Court of Appeals for the Eleventh Circuit, the Eleventh Circuit properly determined that Petitioner had failed as a factual matter to establish that the jury was misled as to any alleged motivations for the giving of testimony by co-perpetrator John Maree against Petitioner at Petitioner's trial, so as to establish a violation of Petitioner's constitutional rights to due process. As the facts were

adequately developed in the state court and the district court and the facts were adequately reviewed by the appellate courts, which applied appropriate federal legal principles to these facts, this Court should decline to review this issue raised by Petitioner.

II. THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT PROPERLY  
DETERMINED THAT PETITIONER WAS NOT  
ENTITLED TO LITIGATE THE MERITS OF HIS  
ALLEGED UNCONSTITUTIONALLY COMPOSED  
TRAVERSE JURY, AS PETITIONER HAD FAILED  
TO ESTABLISH ANY CIRCUMSTANCES WHICH  
WOULD EXEMPT HIM FROM HIS STATE  
PROCEDURAL DEFAULT.

Petitioner has alleged that this Court should grant certiorari to determine whether the refusal to adjudicate the merits of Petitioner's "admittedly valid challenge to the composition of his trial jury in light of a valid state procedural waiver rule is manifestly unjust under this Court's decision of Wainwright v. Sykes, 433 U.S. 72 (1977)."

Respondent respectfully disagrees with this allegation made by Petitioner, especially that portion in which Petitioner alleges that he has now made an "admittedly valid challenge to the composition of his trial jury." Respondent has never conceded that any challenge to the traverse jury due to alleged underrepresentation of women would have been "valid" with reference to Petitioner's case, as this issue has never been litigated in Petitioner's case on its merits. Therefore, Respondent respectfully submits that the validity of such a challenge in the context of Petitioner's case is not before the Court, but rather, this Court must determine whether the United States Court of Appeals for the Eleventh Circuit properly found that Petitioner had waived his right to have this claim considered on its merits.

The United States Court of Appeals for the Eleventh Circuit properly found that, "It is clear from the record, and the parties agree, that Smith made no objection to the jury composition because of underrepresentation of women at or before his trial and therefore waived his right to assert the matter under state law. The question is therefore whether Smith is entitled under any theory to be relieved of his waiver of the claim and to assert the jury composition claim on this second petition for habeas corpus." Smith v. Kemp, supra, Slip Op. at 5169.

The Petitioner did not challenge the composition of the grand or traverse jury in Bibb County, Georgia, prior to his trial, as required by the long-standing rule of Georgia procedure which states that a defendant must challenge the jury composition at, or before, the time the jury is "put upon him." O.C.G.A. § 15-12-162; Ga. Code Ann. § 59-803. Both Georgia procedure and Federal procedure recognize a "cause" exception to the timeliness requirement. See Simmons v. State, 266 Ga. 110, 172 S.E.2d 680 (1980), and Francis v. Henderson, 425 U.S. 536, 542 (1976).

Not only did Petitioner fail to challenge the compositions of his grand or traverse juries prior to trial, but he also declined to raise an allegation concerning allegedly unconstitutional composition of the juries on direct appeal to the Supreme Court of Georgia, or in Petitioner's initial state habeas corpus action filed in the Superior Court of Tattnall County, Georgia. Additionally, Petitioner did not challenge the composition of the grand or traverse juries in Bibb County by means of his initial federal habeas corpus actions filed in the United States District Court for the Middle District of Georgia, Macon Division, nor did Petitioner attempt to establish "cause and prejudice" under Francis v. Henderson, supra, in order to seek to avoid the state procedural bar already imposed concerning this claim.



In January of 1975, some five days prior to Petitioner's trial, this Court held in Taylor v. Louisiana, 419 U.S. 522 (1975), that a statute automatically excluding women from jury service unless they opted to be included by request, a so-called "op-in statute," was unconstitutional. Petitioner was then tried, convicted and received the death penalty in the Superior Court of Bibb County. Following Petitioner's trial, his co-indictee, Rebecca Machetti, was convicted and sentenced in the Superior Court of Bibb County, receiving her sentence of death on March 1, 1975. That same year, a Georgia statute providing that women were to be automatically included in jury lists unless they opted not to serve, a so-called "op-out statute" as codified in Ga. Code Ann. § 59-124, was repealed. Subsequently, in January of 1979, this Court in Duren v. Missouri, 439 U.S. 357 (1979), held that a state statute which allowed women by request to opt-out of jury service was unconstitutional.

It was not until Petitioner's co-indictee, Rebecca Machetti, was granted federal habeas corpus relief by the United States Court of Appeals for the Fifth Circuit in Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982), that Petitioner sought to litigate the alleged unconstitutional jury composition claim by raising this issue in a successive state habeas corpus petition filed in the Superior Court of Butts County. The United States Court of Appeals for the Eleventh Circuit noted that the state habeas corpus court, as did the Supreme Court of Georgia, applied the state procedural waiver rule and did not consider the alleged illegal jury composition issue on its merits. The federal district court also declined to consider the issue on its merits because the state courts had applied the state procedural waiver rule. Smith v. Kemp, supra, Slip Op. at 5170. The state procedural waiver rule was uniformly applied by all courts considering this issue after it was raised for the first time in Petitioner's successive state habeas corpus petition in Butts County, Georgia.

In United States v. Prady, 456 U.S. 152 (1982), cited by the United States Court of Appeals for the Eleventh Circuit, this Court found that before a federal court could consider the merits of Prady's complaint relating to allegedly erroneous jury instructions, in the presence of a contemporaneous objection rule applicable to state courts, Prady had to meet the "cause and actual prejudice" standard enunciated in Davis v. United States, 411 U.S. 233 (1973), and as extended in Francis v. Henderson, 425 U.S. 536 (1976) and Wainwright v. Sykes, 233 U.S. 72 (1977).

In United States v. Prady, supra, this Court found a "double procedural fault." In this case, Respondent submits that a "triple procedural default" is present. Further, Respondent submits that the United States Court of Appeals for the Eleventh Circuit acted properly in requiring that Petitioner demonstrate "cause and prejudice" before he could be exempted from the state procedural bar with reference to his jury composition claim and allow this claim to be considered on its merit.

In Engle v. Isaac, 456 U.S. 1078 (1981), this Court stated that, " . . . any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." The United States Court of Appeals for the Eleventh Circuit properly found that Petitioner had failed to establish "cause" within the meaning of this requirement, based on any of the assertions made in oral argument or in his brief presented to that court. Although this Court's decision in Taylor v. Louisiana, supra, was decided only six days prior to Petitioner's trial, the United States Court of Appeals properly cited this Court's decision in Engle v. Isaac, supra, and concluded that Petitioner's counsel's lack of awareness of the decision in Taylor v. Louisiana, supra, does not establish "cause."



Similarly, the United States Court of Appeals for the Eleventh Circuit properly rejected the assertion of "cause" made by Petitioner that there had been a supervening "change" in the law, finding that Petitioner's jury composition claim emanated directly from Taylor v. Louisiana, supra, which was cited by Petitioner in 1977 during the Supreme Court of Georgia's review of Petitioner's first state habeas corpus action. Id. at 5171.

In light of these facts and circumstances, the United States Court of Appeals for the Eleventh Circuit concluded:

In this case, Smith cannot show "cause" for his procedural default such that a hearing on the merits is necessary to prevent a "miscarriage of justice," nor can he show that "actual prejudice" from the constitutional defect in jury selection affected his conviction.

Id. at 5171.

Respondent submits that this holding was proper and that if the doctrine of waiver as enunciated by this Court in Wainwright v. Sykes, supra, were not applied, the waiver principles would be undermined, as well as the demands of comity and finality often cited as important legal principles when examining federal legal review of state court convictions. Respondent submits that contrary to the assertions of the Petitioner, such decisions of this Court as Francis v. Henderson, supra, note that concerns for comity and the orderly administration of criminal justice require that in such circumstances as these the federal court should not exercise its habeas corpus power to review a claim on its merits.

If the Court found "manifest injustice" to exist in this case, so as to allow a consideration of the merits of Petitioner's allegedly illegally composed jury on its merits,

this Court would in effect be nullifying the valid concerns of the state in legislatively providing for a state procedural waiver rule. Petitioner simply did not preserve this issue for review and therefore, it is not "manifest injustice" to prevent a habeas corpus petitioner who has committed a "triple procedural default," from being allowed to litigate on its merits a claim which he has admittedly waived his rights to adjudicate under state law.

In rejecting Petitioner's "manifest injustice" claim, the United States Court of Appeals for the Eleventh Circuit properly analogized this case to the decision of this Court in Daniel v. Louisiana, 420 U.S. 31 (1975). In Daniel v. Louisiana, supra, the court found that even in the presence of a case in which there was no procedural default by a defendant, that unconstitutional jury composition does not necessarily render a criminal trial unfair. Where as here, there was a procedural default and Petitioner has not established cause or prejudice, the conclusion must be inexorably reached that no manifest injustice would result from the application of the waiver principles contained in both state and federal law.

As this case presents a classic example of circumstances under which the waiver principle should be applied, in the absence of a showing of cause and prejudice to exempt a petitioner from a state procedural waiver rule, this issue presents nothing for review by this court.

#### CONCLUSION

For all the above and foregoing reasons, Respondent respectfully requests that this Court deny the Petition for a writ of certiorari filed on behalf of John Eldon Smith, there being no substantial federal question presented review for reivev by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition to the Petition for a Writ of Certiorari by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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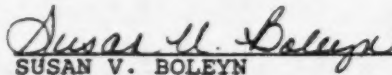
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